Wellstream Corporation and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229. Cases 15—CA–11631, 15–CA–11650, 15–CA–11650–2, 15–CA–11650–3, 15–CA–11650–4, and 15–RC–7620

February 25, 1994

# DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

## By Chairman Stephens and Members Devaney and Truesdale

The issue presented is whether the Respondent Employer violated Section 8(a)(1) and (3) of the Act and whether the election should be set aside.

On March 15, 1993, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed limited cross-exceptions and answering briefs to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rul-

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also asserts that the judge ignored substantial evidence and that the judge had a predetermined view of the case. According to the Respondent, that evidence could not have been considered, as the judge appeared to sleep through at least one-third of the first day of hearing. We agree with the General Counsel that there is nothing which supports the Respondent's contention that the judge appeared to sleep during any part of the hearing. Rather, a review of the record indicates that the judge was alert and an active participant in the proceedings throughout the hearing. Further, in his decision, the judge gave full consideration to all the evidence as demonstrated by his complete discussion of the issues. There is no indication that the judge prejudged the case or displayed any bias in his conduct of the hearing or in his analysis or discussion of the evidence. Accordingly, we find no merit in the Respondent's allegations.

<sup>2</sup>The Respondent attacks the judge's finding that the Respondent violated Sec. 8(a)(1) through its actions in connection with a betting pool on the election, contending that the finding is inconsistent with the Board's treatment of the "betting poster" in *Best Western Executive Inn*, 272 NLRB 1315 (1984). We disagree. The Board found that the poster was not objectionable party conduct because it was not attributable to the employer, because it was anonymously posted on a wall and ultimately removed by the employer. Id. In the present case, the idea for the betting pool came from management, which instructed an employee to maintain the list, and the list, showing names of who was betting on the "Company" and who on the "Union," was kept on a desk in a supervisor's office, where supervisors could see who was taking which side. Furthermore, here, unlike in *Best Western*, the pool was conducted in a context of numerous other coercive threats and actions.

ings,<sup>1</sup> findings,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order as modified.

### ORDER4

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wellstream Corporation, Panama City, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

- 1. Substitute the following for paragraphs 1(b) and (c).
- "(b) Threatening employees with discharge, unspecified discipline, and the futility of their support for or the selection of a union, with the withholding of their normal shift rotation, with a lawsuit, or with loss of a wage increase.
- "(c) Instituting and disparately enforcing a uniform policy in order to restrain and inhibit the wearing of union T-shirts and other union insignia."
- 2. Substitute the attached notice for that of the administrative law judge.

We likewise find no merit to the Respondent's exceptions to the judge's finding that the Respondent was seeking to thwart the union campaign when it implemented an expanded dress code requiring the wearing of uniforms even when visitors were not in the plant. We note that although employee Grant Stevenson could not state exactly when the new policy on uniforms was instituted, he did say he was sure that it was instituted in late May or early June, after employee Chris Parker had sent a letter to the employees soliciting their support for the union campaign.

We agree with the judge that the Respondent violated Sec. 8(a)(1) of the Act by soliciting grievances from employee Chris Parker and implicitly promising to remedy them. Accordingly, we find it unnecessary to pass on whether the Respondent also violated Sec. 8(a)(1) by soliciting grievances from employee Daniel Battistini. Such a finding would be cumulative and would not affect the Order.

<sup>3</sup>The judge inadvertently failed to include in his Conclusions of Law, his finding that the Respondent implemented its uniform policy in order to curtail the wearing of union T-shirts as well as other union insignia. Accordingly, Conclusion of Law 7 is modified to read as follows: "By its implementation and enforcement of a new uniform policy in order to curtail the wearing of union T-shirts and other union insignia, the Respondent violated Section 8(a)(1) of the Act." We shall also modify the recommended Order accordingly.

We agree with the judge that Objections 1,A and 1,C be sustained since the Respondent engaged in numerous violations of Sec. 8(a)(1) also alleged as objectionable conduct warranting the setting aside of the election. However, we find it unnecessary to pass on the merits of Objection 2,C, which alleged that the Respondent engaged in objectionable conduct by its distribution of a letter to all employees which threatened plant closure, and threatened employees with loss of employment in the event of a strike.

<sup>4</sup>We shall modify the judge's recommended Order to delete any reference to threats of plant closure. The only complaint allegation which alleges such a threat was withdrawn. Further, although the judge at one point in his decision states that he had earlier made such a finding, in fact the decision contains no finding that the Respondent committed an unfair labor practice by making such a threat. (The threat of plant closure alleged in the objections was not alleged in the complaint or discussed by the judge in conjunction with his unfair labor practice findings.)

IT IS FURTHER ORDERED that the election held in Case 15–RC–7620 is set aside and that the case is remanded to the Regional Director to conduct a new election where he deems the circumstances permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

### **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you concerning your union membership, sympathies, and activities and those of your fellow employees.

WE WILL NOT threaten you with discharge, unspecified discipline, and the futility of your support or selection of a union; WE WILL NOT threaten you with withholding your normal shift rotation, with filing a lawsuit, and with loss of a wage increase.

WE WILL NOT implement and enforce a uniform policy in order to prohibit you from wearing union T-shirts and other union insignia.

WE WILL NOT distribute and maintain an overly broad no-solicitation rule.

WE WILL NOT refuse to follow our normal practices of shift rotation for prounion employees.

WE WILL NOT institute and conduct a betting pool among our employees on the outcome of a National Labor Relations Board representation election.

WE WILL NOT solicit grievances from our employer with the implicit promise to remedy them in order to discourage them from choosing union representation.

WE WILL NOT disparately limit access of prounion employees to the second and third floors of our facility.

WE WILL NOT assign more onerous duties to our employees who support the Union.

WE WILL NOT issue written warnings, suspend, or discharge our employees because of their membership in or support for the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL rescind our unlawful written warnings issued to Chris Parker and Daniel Battistini, our unlawful suspensions of Chris Parker and Daniel Battistini, and our unlawful discharge of Daniel Battistini. WE WILL make Jon Eric Clenney, John Chris Parker, and Daniel Battistini whole for all loss of earnings and benefits including seniority and other rights and privileges sustained by them because of our unlawful conduct, with interest, as a result of our failure to rotate Clenney, Parker, and Battistini from shift to shift, our suspensions of Chris Parker and Battistini, and our discharge of Daniel Battistini. WE WILL offer Daniel Battistini full reinstatement to his former position or to a substantially equivalent position if his former position no longer exists.

WE WILL remove from our files any references to the unlawful failure to rotate employees Jon Eric Clenney, John Chris Parker, and Daniel Battistini, the unlawful issuances of written warnings to Parker and Battistini, the unlawful suspensions of Parker and Battistini, and the unlawful discharge of Battistini and will inform them in writing that this has been done and that the unlawful conduct will not be used against them in any manner in the future.

Our employees have the right to join and support United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229 or to refrain from doing so.

#### WELLSTREAM CORPORATION

Kathleen McKinney, Esq., for the General Counsel.

Douglas Sullenberger, Esq., of Atlanta, Georgia, for the Respondent.

Brian A. Powers, Esq., of Washington, D.C., for the Charging Party.

# DECISION

# STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on July 28, 29, and 30, 1992, at Panama City, Florida. The hearing was held pursuant to an order rescheduling hearing in the above-entitled consolidated complaint and representation matter entered by the Regional Director for Region 15 (the Regional Director) of the National Labor Relations Board (the Board) on June 11, 1991. The original complaint in Case 15–CA–11631 was filed by the Regional Director on September 27, 1991, and is based on a charge filed by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229 (the Charging Party, the Petitioner, or the Union) on September 12, 1991. On October 11, 1991, the Regional Director en-

tered a Report on Objections and order consolidating cases and directing hearing in Cases 15–RC–7620 and 15–CA–11631. In his Report on Objections, the Regional Director determined that pursuant to a Stipulated Election Agreement approved on July 12, 1991,¹ an election was held among certain employees of Wellstream Corporation (the Employer, the Respondent, or the Company) on August 29 and 30 to determine whether they desired to be represented for the purposes of collective bargaining by the Petitioner Union with the following results:²

Approximate number of eligible votes 88	8
Void ballots	Û
Votes cast for the Petitioner 30	J
Votes cast against the Petitioner 55	5
Valid votes counted 85	5
Challenged ballots	2
Valid votes counted plus challenged	
ballots 87	7

In his report the Regional Director also found that the Union had filed timely objections to the election, certain of which had been withdrawn by the Petitioner Union and concluded that a hearing should be held on Petitioner's Objections 1,A, 1,C, the remaining portion of 1,F relating to unlawful interrogation, and 2,C as they raised substantial and material issues of fact and credibility which could best be resolved at a hearing and consolidated the hearing on objections with the hearing in Case 15–CA–11631.

Subsequently on January 31, 1992, the Regional Director entered an order further consolidating cases, consolidated complaint, and notice of hearing in Cases 15–CA–11650, 15–CA–11650–2, 15–CA–11650–3, 15–CA–11650–4, and 15–RC–7620. On May 22, 1992, the complaint was amended by the Regional Director. Ultimately the complaint came to hearing on July 28, 1992, at which time the General Counsel moved to amend the complaint based on a charge filed by the Union on that date. The Respondent objected to the amendment which I granted with the Respondent accorded permission to renew the motion at the end of the hearing and argue it in his brief. The Respondent has fully answered the allegations and has denied the commission of any unfair labor practices in the complaint as evidenced by its answers contained in the formal documents as amended at the hearing

On the entire record in this proceeding, including my observations of the witnesses who testified here, and after due consideration of the briefs filed by the General Counsel, counsel for the Charging Party and Petitioner Union, and counsel for the Respondent, I make the following

#### FINDINGS OF FACT

#### I. JURISDICTION

## A. The Business of Respondent

The complaint alleges, Respondent admits, and I find that at all times material Respondent is and has been a Delaware corporation, with an office and place of business in Panama City, Florida, where it has been engaged in the manufacture and nonretail sale of flexible pipe, that during the 12-month period ending August 31, 1991, Respondent, in the course and conduct of its business operations, sold and shipped from its facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of Florida, and that Respondent is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## B. The Labor Organization

The complaint alleges, Respondent admits, and I find that at all times material the Union is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

# II. RESPONDENT'S MOTION TO DISMISS THE AMENDED CHARGE IN CASE 15—CA—11650—4

,At the commencement of the hearing on July 28, 1992, in this case, the General Counsel stated on the record that prior to hearing, Respondent's counsel was served with an amended charge in Case 15-CA-11650-4 and moved for leave to amend the complaint to include those allegations. The charge had been filed by the Union and served on the Respondent at its plant on July 28, the date of the hearing, shortly prior to the hearing. The allegations in the charge alleging violations of Section 8(a)(1), (3), and (4) of the Act which the General Counsel sought to add to the complaint were that the Respondent on or about December 12, 1991, solicited grievances from its employees; in mid-September 1991, imposed more onerous working conditions on its prounion employees; and on or about August 22, 1991, conducted an election pool. The amendment also contained an allegation that Respondent had on or about December 5, 1991, suspended its employee John (Chris) Parker for 5 days without pay because of his union activities and because of his prior participation in other unfair labor practice charges. Respondent's counsel objected to the amendment at the hearing asserting that the allegations were time-barred by the 6month 10(b) period set out in the Act and also asserted surprise because of the late filing of the amendment. In the alternative Respondent's counsel requested a postponement "at some point . . . of the remainder of the hearing' to prepare for the new allegations. I permitted the proposed amendments, informed Respondent's counsel that its objections would also serve as an answer denying the new amended allegations and that the 10(b) motion would be treated as an affirmative defense. I also informed the parties that if the Respondent required a continuance after the presentation of the remainder of its case, I would consider that request at that time whereupon we proceeded with the hearing to its conclusion with each of the foregoing new allegations fully litigated and without any further request by Respondent's counsel for a continuance. Respondent subsequently filed a

<sup>&</sup>lt;sup>1</sup> All dates are in 1991 unless otherwise specified.

<sup>&</sup>lt;sup>2</sup> The appropriate unit is:

All production and maintenance employees employed by the Employer at its Panama City, Florida, facility including quality control inspectors, assistant supervisor, supervisor trainees, and receiving clerk, excluding all office clerical employees, draftsmen, production scheduler, laboratory technician, administrative technicians, document control clerk, inventory clerk, assistant buyer, technical assistants, manufacturing clerk, manufacturing engineers, professional employees, guards and supervisors as defined in the Act

posthearing motion to dismiss the amended charge in Case 15–CA–11650–4 asserting that the amended charge incorporated in the amended complaint was time-barred under Section 10(b) of the Act and that it had been unfairly surprised by the amendment. In its motion the Respondent asserts that all allegations within the amended charge concern conduct which occurred outside the 6-month limitations period contained in Section 10(b) and that none of the allegations contained in the amended charge relate back to the subject matter of any previously filed charge which went to complaint in this matter. Counsel for the General Counsel and counsel for the Charging Party each filed responses opposing the Respondent's motion to dismiss the amended charge.

With respect to the allegation concerning the 5-day suspension of John Chris Parker on December 5, 1991, this allegation was contained in a prior timely charge filed December 12, 1991, in Case 15-CA-11650-4, which also listed the layoff of several other employees. The layoff allegations of this charge had been withdrawn. However the allegation of the 5-day suspension of Parker had not been withdrawn. I accordingly find that this allegation is not barred by Section 10(b). Moreover, this allegation as do the other allegations in the amended charge incorporated in the complaint involve allegations of Section 8(a)(1) and (3) of the Act as contained in the order further consolidating cases, consolidated complaint and notice of hearing issued on January 31, 1992, involving pre- and postelection conduct as part of Respondent's overall efforts to thwart the union campaign including the identification and weeding out of the union organizers among its employees. I thus find the allegations in the amended charge are closely factually related to the allegations in the complaint of January 31, 1992. Well-Bred Loaf, 303 NLRB 1016 fn. 1 (1991); Nickles Bakery of Indiana, 296 NLRB 927 (1989): I also find that the Respondent's motion must fail on its assertion of surprise as I offered the Respondent an opportunity to file a motion for a continuance of the hearing solely to prepare for the defense of the newly added allegations, but Respondent failed to request such a continuance and these allegations were fully litigated. Roslyn Gardens Tenants Corp., 294 NLRB 506 fn. 6 (1989); Brookhurst Professional Building, 279 NLRB 1176, 1182 fn. 17 (1986). I accordingly deny Respondent's motion.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

## A. Background

As set out above the Respondent is engaged in the manufacture and distribution of flexible pipe systems utilized in the offshore oil and gas industry to transport products underseas and operates from its facility in Panama City, Florida. It is a relatively new company, with one chief competitor, a French company that dominates the business of manufacturing and distributing flexible pipe systems for the oil and gas industry. In July 1991 at the time of the election campaign, Respondent's production workers included nine maintenance mechanics at its facility. These mechanics were John (Chris) Parker, Bert Greer, Dan Battistini, Jon (Eric) Clenney, A. J. Roper, Rickey Cranford, James Snow, Gerald Riley, and Arsenio Bacani. In addition Herman Riley was employed as an electronic technician and there were four welders: Russell Hines, John Hayes, Ray Jordan, and Terry Luckie. Allen

Sapp supervised the maintenance department and reported to Ray Marlow,<sup>3</sup> the engineering manager who reported to Jeff Jordan, the general superintendent. James Wilson was the building facilities superintendent. Robert Miller was the president and chief executive officer of Respondent.

In May John (Chris) Parker initiated an organizing campaign among Respondent's employees by sending unsigned letters addressed to Respondent's employees and postmarked May 26. In his letter Parker discussed working conditions including recent layoffs, management changes, decreases in benefits, and alleged favoritism and stated that the writer believed a union could resolve these problems and that he would be listening for comments on the plant floor to ascertain if there was sufficient support for a union. Subsequently Parker determined that conditions were favorable for union representation and he contacted Union Business Agent Greg Boggs. The Union sent a letter to Respondent dated July 12 informing it that Parker was the chairman of the Union's organizing committee. On July 16, Respondent posted a memorandum throughout the plant signed by George Scott, the manager of manufacturing, which stated that Respondent had received the letter from the Union and that Parker should not be treated differently, because he was "pushing for the Union." Respondent's memorandum also stated that Parker would not get any special favors, because he was the "anointed union pusher." On July 24, the Union wrote the Respondent informing it that Jon (Eric) Clenney and Daniel Battistini had become members of the organizing committee also. Subsequently Parker, Battistini, and Clenney became active union organizers soliciting union authorization cards, wearing union buttons and T-shirts, and engaging in handbilling at the Respondent's facility. Parker also testified he talked with employees on behalf of the Union on and off Respondent's premises. Parker, Battistini, and Clenney were all maintenance mechanics and all but one of the maintenance mechanics were in favor of the Union. It was known by Respondent that the source of the strongest support for union efforts and sentiment was the maintenance department. During the preelection campaign, the union supporters attempted to pass out a letter each week with the final letter being entitled "Truth" handed out at the plant entrance. This letter spoke of lies concerning pay raises and evaluations. Subsequently in July, Respondent posted its memorandum entitled "Truth" on all the department bulletin boards and in it referred to Parker. Engineering Manager Ray Marlow handed Parker a copy of this memorandum and told him to read it.

Respondent for its part mounted a vigorous antiunion campaign. It held four to five meetings with its supervisors and management officials at a restaurant in town. The first meeting took place within 2 to 3 weeks of the initial letter sent by Parker with the production supervisors present as well as Respondent's upper level management officials and was conducted by Respondent's attorney, Douglas Sullenberger. Former Supervisors Jack Bryant and Craig Baker testified that the supervisors were instructed to keep their eyes open and that it was generally discussed and concluded by those present that Parker had sent the anonymous letter. Supervisors were instructed they could not threaten, interrogate, promise anything to, or spy on employees. Sullenberger in-

<sup>&</sup>lt;sup>3</sup> In the fall of 1991, Marlow was promoted to plant manager.

quired regarding whether there was a uniform policy and was told the employees had uniforms but were only required to wear them if visitors were coming to the plant. He advised it would be a good time to initiate a uniform policy requiring employees to wear uniforms to curtail the wearing of union T-shirts. Sullenberger also inquired if the Employer had a nonsolicitation policy and was told it did. Former Supervisor Bryant testified that Sullenberger was told that the sale of cookies and raffle tickets had been permitted whereas Supervisor Craig Baker testified that at that time this was no longer permitted. I credit Bryant. Sullenberger advised Respondent to begin enforcing the nonsolicitation policy. He also told the supervisors to keep their eyes open and, if they saw employees gathering and talking, to break them up. Following this meeting, Respondent commenced to require uniforms be worn regularly and to enforce the nonsolicitation policy in accordance with Sullenberger's instructions. In addition to the meetings held at the restaurant, there were regular supervisory meetings held each week at which the supervisors would discuss the employees and whether they were prounion or antiunion and the reasons therefor. Bryant recalled that employees Parker, Battistini, Clenney, Greer, John Huffman, and Roper were discussed as being prounion. Supervisors were told to tell the employees "horror stories" about the Union. The supervisors were told to watch Parker, Battistini, Greer, and Huffman and keep them away from other employees. Bryant testified that the supervisors were told to write up any of these employees for any observed infractions, such as "safety glasses, safety boots, whatever" but to clear the writeups with Jeff Jordan to ensure that everything was "legal." Bryant also testified that the supervisors were told to eat lunch in the breakroom rather than their office in order to discourage union talk among the employees. Bryant testified further that on the date of the election after the close of the polling place, General Superintendent Jeff Jordan went to the supervisors' office and told Bryant to remove two employees from the overtime list stating, "I do not want them union son-of-a-bitches in my shop. Take them off and find somebody to replace them." Bryant complied and removed the employees' names from the overtime list. Supervisor Craig Baker testified he was called to Jordan's office on the date of the election after its completion and that Jordan had the overtime list and had highlighted some names on the list and told him to remove John Huffman a prounion employee's name from the list and to make sure he did not work any overtime.

## B. Alleged Unlawful Interrogation

## 1. June 14

Scott Parker, the brother of Chris Parker, testified that around June 18, then General Superintendent Jeff Jordan approached him and another employee, Randy Lawdry, with whom he was standing at the flex lock machine and told them that unions were bad and had caused him the loss of a prior job. Jordan went on to ask Scott Parker exactly what was going on with the Union. Parker told Jordan he did not know what was going on with the Union as his brother went his way and he went his. As Jordan was not called to testify, Scott Parker's testimony is unrebutted and I credit it. I find that this interrogation of Scott Parker by Respondent's agent Jordan, an upper level management official, violated Section

8(a)(1) of the Act. There was no evidence that Scott Parker was an active union adherent. Moreover, the question went beyond Scott Parker's union activities, if any, and sought any information whatsoever about the Union and union activities of other employees that Scott Parker might be aware of. I find the evidence gives rise to and supports the inference that Jordan was seeking information from Scott Parker about the Union, because his brother Chris Parker was suspected to be the leader of the union campaign. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). See *Airport Distributions*, 280 NLRB 1144 (1986).

### 2. June 28

Chris Parker testified that on June 28, he and fellow employee A. J. Roper were approached while on the third floor by Harry Driscoll, manager of security and special projects. Driscoll spoke to Parker and told him he had worked in the past under various unions and stated that unions were no good. Driscoll then asked Parker if he knew "who might be behind the talk on the floor about the Union." Neither Parker nor Roper responded to this inquiry. As Driscoll was not called as a witness, Parker's testimony is unrebutted and I credit it. I thus find that this interrogation of Parker by Respondent's agent, a member of upper level management, concerning the identity of the employee who had initiated the union campaign was inherently coercive and violative of Section 8(a)(1) of the Act.

## 3. July 9

Chris Parker testified that on July 9 Engineering Manager Ray Marlow approached him at a machine on which he was working and asked Parker if he was going to attend the representation hearing set for July 11. Marlow went on to tell Parker to come by his office and he would tell him some horror stories about the Union. I credit Parker's unrebutted testimony in this regard as although Marlow was called to testify, he was not questioned regarding the contents of this conversation. I accordingly find that Respondent through its agent Marlow, a high-level member of management, violated Section 8(a)(1) of the Act by its unlawful interrogation of Parker concerning his union activities. Although the Respondent at the hearing attempted to elicit testimony from Parker to the effect that he and Marlow frequently had friendly conversations, Parker denied this and testified Marlow had intimidated him regularly because of his support of the Union and I credit his testimony in this regard also.

## C. The Nonsolicitation Rule

Prior to the advent of the union campaign. Respondent maintained a nonsolicitation rule in its employee handbook which was distributed to its employees. The rule provided as follows:

Solicitation of any type on company premises during working hours for non-work related matters is strictly prohibited. This includes, but is not limited to, any literature of a religious, charitable, political, or commercial nature. Violation of this policy may lead to immediate termination.

The employees' handbook also defines "Hours of Work" as follows:

The normal work week for full time employees is 40 hours per week, based on an eight-hour day, five days per week, Monday through Friday, inclusive. The hours for each location, including meal periods, will be established locally by the company. The manufacturing will be handled on a shift basis with the working hours to be assigned.

Former Supervisor Jack Bryant testified without rebuttal that, at a management meeting at the Harbor House Restaurant held to discuss the Union's organizational campaign shortly after Parker's May letter to the employees, Respondent's attorney, Douglas Sullenberger, asked if there was a nonsolicitation rule and on being told there was, he asked if it was being enforced. He received the reply that it was not being enforced as various solicitations such as for Girl Scout cookies were permitted. He then told those present that it should be enforced and according to Bryant's unrebutted testimony, it was enforced. It should be noted that Bryant also testified in unrebutted testimony that the supervisors were told to break up groups of employees to keep them from discussing the Union, and that supervisors should begin eating their lunch with employees in order to inhibit union discussion among the employees.

It is well settled that prohibitions on solicitation during "working time" are presumed valid whereas prohibitions on "work hours" are presumed invalid. The Board has held that the term "working time" is a clear indicator that the solicitation rule is to apply only during actual working periods excluding breaks whereas the term "working hours" is susceptible of the interpretation that prohibition against solicitation applies during all working hours. The Board therefore requires "the Employer to show by extraneous evidence that, in the context of a particular case, the working hours rule was communicated or applied in such a way as to convey an intent clearly to permit solicitation during break time or other periods when employees are not actively at work.' Our Way, Inc., 238 NLRB 209, 214 (1978), quoting Essex International, 211 NLRB 749, 750 (1974). There was no evidence presented by Respondent that it communicated to employees that the nonsolicitation rule did not apply during break periods. Moreover as set out above, the unrebutted evidence submitted by the General Counsel through the testimony of former Supervisor Jack Bryant conclusively establishes that Respondent commenced to enforce the rule specifically in order to stem the union campaign whereas it had not previously been enforced. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by its distribution and maintenance and enforcement of this over broad no-solicitation rule.

### D. The Dress Code

The testimony of former Supervisors Jack Bryant and Craig Baker and employees Battistini, Parker, Grant Stevenson, and James Roberts established that Respondent did not have an established dress code policy until after the advent of the union campaign and that it's implementation was motivated by Respondent's desire to inhibit the wearing of union T-shirts. Former employee Grant Stevenson, who was employed as a laborer until his layoff in November 1991, testified that about the end of May the Respondent issued the

employees two company work shirts each, which were to be worn everyday from then on by employees.

Former Supervisors Jack Bryant and Craig Baker testified that at the initial meeting held by Attorney Sullenberger to discuss the union campaign after the Respondent learned of Parker's May letter to the employees concerning their interest in a union, Sullenberger inquired whether there was a dress policy. On being informed employees were only required to wear uniforms when customers were coming through the plant, Sullenberger suggested a dress policy be implemented in order to inhibit and prohibit the wearing of union T-shirts and insignia by employees. Bryant and Baker testified that a dress policy was thereafter implemented.

In late July employees Battistini and Parker were told by Supervisor James Wilson to button their company shirts and tuck them in at the time they were wearing union T-shirts. Parker testified that Wilson told them the policy had been implemented on Marlow's orders because of the Union and also because of safety. I credit the testimony of Parker and Battistini which was unrebutted as Wilson was not called to testify. In mid-September a few minutes prior to worktime, Parker was told in the breakroom by Supervisor Allen Sapp to button up his work shirt and tuck the tail of his shirt in. Parker had his work shirt unbuttoned and opened at the time exposing his union T-shirt. Parker replied he would button it at 7 a.m. (the start of his shift). Sapp replied that he had better button it up prior to coming out on the work floor and said, "Chris, this is your final warning." Parker's testimony concerning the incident with Sapp was corroborated by employee Robbie Lockamy. On another occasion when Battistini was working out in the outside heat on the crane he had his work shirt off and had only his union T-shirt on and was told by Supervisor Allen Sapp to put his work shirt on and button it although only one other employee (Terry Luckie) was nearby. Battistini was told to either button up his shirt or turn the union T-shirt inside out. Battistini and Parker both testified that on numerous occasions they and other employees were permitted to wear their work shirts open when it was hot and were regularly observed by supervisors including Marlow, Sapp, and Wilson so long as they were wearing T-shirts other than the union T-shirt.

Employee Christopher Short testified that after the implementation of the uniform policy his supervisor, John Miller, enforced the dress code policy but would permit an employee to wear the uniform shirt unbuttoned after a hot job until they cooled off. Employee James Roberts testified that no one ever bothered him and that he did not wear uniforms and was never sent home to change.

I credit the testimony of the former supervisors and employees as set out above. I find that the Respondent implemented the uniform policy and enforced it disparately in order to inhibit the wearing of union T-shirts and other union insignia. Although it may be that the Respondent implemented the uniform policy in part because of business-related reasons to present a neat organized look to its customers, it is clear and I find that the evidence supports the conclusion that the policy was implemented primarily in order to inhibit the union campaign by precluding the wearing of union T-shirts. Moreover it is abundantly clear, and I conclude from the evidence that the policy was enforced disparately in order to inhibit the wearing of union T-shirts. I thus find that Respondent violated Section 8(a)(1) of the Act by its implemen-

tation and enforcement of the uniform policy. *Ideal Macaroni Co.*, 301 NLRB 507 (1991). I further find that Respondent's supervisor, Sapp, threatened Parker with unspecified discipline if he did not button his shirt up before going on the plant floor and thereby also violated Section 8(a)(1) of the Act. *Pottsville Bleaching Co.*, 303 NLRB 186 (1991).

## E. The Betting Pool

Former Supervisor Jack Bryant testified that at the second supervisors' meeting at the Harbour House Restaurant Sullenberger suggested that a betting pool on the outcome of the election should be started so that supervisors might put down their guesses by how much the Respondent would win in votes against the Union, in order that unit employees might see this and be influenced by the supervisors' predictions of the outcome against union representation. Bryant was told by Jordan to start the pool. He did not do so and about 3 weeks later he was again called into a meeting with Sullenberger, Davis, and Jordan and asked by Sullenberger whether he had started the betting pool. When he replied in the negative, Sullenberger told him he needed to do it. Jordan then took Bryant with him and told him to make two columns on a sheet of paper for the Company and the Union and take it around to the employees which he did. He obtained two supervisors' and two employees' names on the list. Shortly thereafter he approached Parker who told him this was wrong. Ten minutes later Jordan paged him back to the meeting with Sullenberger who told him he should not have obtained the supervisors' names and that a unit employee should handle the betting pool. Jordan then selected Frank Fraioli to handle the pool, and Bryant turned the list over to him. Fraioli was a nonsupervisory technician who used a desk in the supervisors' office. Fraioli destroyed the old list and made a new one. During the course of the campaign, Fraioli kept the betting list with various employees' names thereon with their guesses and \$2 bets as to the number of votes for the Company and the Union. According to Fraioli, he kept the list in the desk used by him in the supervisors' office and took it out when someone wanted to place a bet. Fraioli was permitted to do this during worktime. Bryant testified he observed it laying on the desk in plain view on a number of occasions. It is undisputed that in addition to the supervisors who used the office, members of upper level management came into the office. Sullenberger and Jordan were not called as witnesses in the case, and Davis was not questioned concerning it. I credit Bryant's testimony and that of Fraioli as set out above with the exception of Fraioli's testimony that he kept the pool in the desk. Rather I credit Bryant that the pool was often on the top of the desk readily observable by supervisors who could and did look at it.

I find that the initiation and carrying out of the pool by Respondent initially by Bryant and subsequently by Fraioli on Jordan's orders was violative of Section 8(a)(1) of the Act as it constituted unlawful interrogation and coercion of employees concerning their union sentiments. When employees were solicited to bet in the pool, they were placed in a vulnerable position of either refusing to participate in which case management could surmise they did not want to make their predictions and their leanings known concerning the outcome of the election, or their prediction was readily available to members of management who were free to and did look at the pool and the predictions of the employees who

participated there. The above was clearly violative of the Section 7 rights of the employees to make an uncoerced choice concerning union representation. As the Board stated in *Glamorise Foundation*, 197 NLRB 729 at 729 (1972), these type of pools are "susceptible to abuse in that they invite comments and speculation at the workplace, close to the ears of interested supervisory personnel, as to how groups and individuals are likely to cast their ballots."

## F. Statements Regarding Shift Rotation

In the summer of 1991, Respondent operated three shifts with the first shift from 7 a.m. to 3 p.m., the second shift from 3 to 11 p.m. and the third shift from 11 p.m. to 7 a.m. Maintenance employees were rotated from one shift to the next on an approximate 6-week basis and received an increment in pay for the second and third shifts. Chris Parker testified that in July on the same day Respondent posted its notice entitled "Truth" which specifically referred to him by name, Supervisor James Wilson informed him he would be retained on the first shift rather than rotated to the second shift. He inquired as to the reason and Wilson told him it was because of the Union. When he inquired who had ordered this, Wilson told him "the second floor" in reference to upper management. Parker further testified that Wilson told him he was being retained on the first shift in order that Respondent could keep a better watch on him. Clenney testified that although he had previously rotated shifts, Wilson told him he would remain on the third shift because of his engagement in union activities and that the decision had been made by upstairs management. I credit Parker's and Clenney's testimony as set out above which testimony was unrebutted as Wilson was not called to testify.

I find the above statements by Wilson to Parker and Clenney that they would no longer be rotated from shift to shift because of their union activities and to Parker that the Respondent wanted to keep a better watch on him were coercive in violation of their Section 7 rights to engage in union activities and that Respondent thereby violated Section 8(a)(1) of the Act. L & J Equipment Co., 272 NLRB 652 (1984).

## G. Failure to Rotate Prounion Employees

As noted above Parker and Clenney were both told by Supervisor Wilson that they would no longer be rotated because of their union activities and they testified they were not rotated from shift to shift as they had been previously rotated approximately every 6 weeks. Prior to the union election, Parker and Battistini were kept on the day shift. Similarly prounion employee Clenney, the other named union organizer, was moved to the second shift where he remained without further rotation. Supervisors Bryant and Baker also testified that Respondent wanted to watch the prounion employees. Supervisor Sapp testified that Battistini and Parker were kept on days, because this was the shift which had the most work to do and also contended that they worked well together.

I credit the testimony of Parker, Battistini, Clenney, Bryant, and Baker and find that Respondent violated Section 8(a)(1) and (3) of the Act by its failure to rotate Parker, Battistini, and Clenney because of their engagement in union activities.

## H. The Restriction of Employee Access

Prior to the advent of the union campaign, maintenance employees were permitted to travel freely about the plant as required according to the undisputed testimony of maintenance mechanics Greer, Clenney, Battistini, and Chris Parker. However, in late July or early August, Respondent instituted a new policy prohibiting prounion and maintenance personnel from going to the second floor where management offices and computers were located without an escort or from going to the third floor where heating and cooling equipment was located without signing a logbook. Greer testified that Supervisor James Wilson told him and Parker of the new policy and that it had something to do with the union mess and things would probably revert to normal when the union campaign was over. Greer then left. Parker testified he asked Wilson whether the new policy applied to procompany employees and Wilson told him it was strictly because of the Union and that the policy had come from Ray Marlow. Clenney testified to another occasion during the union campaign when Supervisors Sapp and Wilson told him maintenance employees needed an escort to go to the second or third floor. Battistini testified that on July 30 Supervisor Wilson called him into his office and told him that no maintenance or prounion employees were permitted to go to the second floor without a guard or to the third floor without signing a logbook. The record discloses that the majority of maintenance employees were union supporters. Battistini testified that all but one maintenance employee supported the Union. I credit the above testimony of Greer, Parker, Clenney, and Battistini which was unrebutted as Wilson was not called to testify and Sapp did not rebut it in his testi-

In response to this evidence, Respondent elicited testimony from Marlow who acknowledged that the no-access policy was instituted but contended it did not pertain only to the prounion employees. Marlow testified that the new policy was instituted to protect the Company from leaks as information was already known by Respondent's chief competitor, at the time announcements were made by Respondent. Marlow also testified that information leaks could jeopardize some large contracts, presumably if the bids on them by Respondent became known to its competition. Marlow acknowledged that no maintenance employees were involved in leaking information. Supervisor Sapp went so far as to testify that "lots of documents [were] being stolen out of the plant." Thus Marlow's and Sapp's testimony concerning the reason for the institution of the new policy differs considerably. Moreover as contended by the General Counsel and the Charging Party, the Respondent presented no specifics or evidence concerning what if any leaks occurred or documents were stolen or evidence of the filing of any police reports or of any other efforts to remedy the situation.

I do not credit the testimony of Marlow and Sapp as set out above concerning the reasons for the institution of the new policy regarding access to the second and third floors. Rather I find that it was instituted in response to the union campaign and applied to union adherents and maintenance employees who were with one exception union supporters. I thus find that the promulgation of the new policy was coercive of the employees' Section 7 rights in retaliation for their union activities in violation of Section 8(a)(1) of the Act.

## I. Onerous Working Conditions

The General Counsel and the Charging Party presented substantial evidence that Respondent set out to and did assign prounion employees unusual and more onerous jobs in order to isolate and to punish them because of their support for the Union. Former Supervisor Jack Bryant testified that at the initial meeting of Attorney Sullenberger and upper management with the supervisors in early June at the Harbour House Restaurant, Sullenberger suggested that the prounion employees should be kept busy and out of the way in an obvious attempt to impede their effectiveness in campaigning on behalf of the Union. George Scott and Marlow then discussed jobs that would keep the union supporters away from the plant floor where the majority of the unit employees performed their duties. At this meeting the decision was made to assign Parker and Battistini (two of the three members of the in house organizing committee on behalf of the Union) to perform work on the Gantry crane which had been in disrepair and idle since 1989. Bryant testified further that at this meeting General Superintendent Jeff Jordan and Supervisor Bob Hoeffling told the supervisors to assign union supporters the dirty jobs which included stripping bobbins, crawling under the flex lock machine and cleaning up oil underneath it, mowing the grass, and the like. Former Supervisors Bryant and Baker testified they complied with these orders and assigned prounion employees to dirty and onerous and unusual jobs. Bryant specifically testified that he assigned Warren Hayes, Davis Booth, Glen Davis, and John Huffman dirty and hard jobs because of their support of the Union. When Bryant assigned Hayes to strip bobbins, Hayes quit. The day after this, Human Resources Manager Davis, in reference to Hayes' having quit, told Bryant that if they had more employees "stripping" (bobbins) it would solve all their problems in an obvious reference to getting rid of union supporters. Supervisor Baker testified he was told by Supervisor Bob Hoeffling to have employee David Booth mow the grass. Baker and Booth were both on the third shift which runs from 11 p.m. to 7 a.m. In compliance with Hoeffling's orders, Baker sent Booth out to mow the grass at midnight.

,As a consequence of the efforts of Respondent's management to isolate and punish union supporters, certain of them were assigned more outside work than they had ever been assigned before, which was significant in view of the hot Florida sun and temperatures reaching 90 to 95 degrees in the summer and fall of 1991. Although Battistini and Parker had been previously assigned outside work only occasionally, they began to be regularly assigned to outside jobs that were unusual in nature and that could have been performed in total or in part by other employees as well. As a consequence of working outside, Parker testified his arms became extremely sun burned with painful pealing of his skin. Parker testified he was assigned to perform work on the plant's substation outside of the building in direct heat and was required to hand sand and cool fill the roof of the substation. No other employee was assigned to work on the substation. Parker and Battistini further testified that in September, they were assigned by Supervisor Wilson to work outside on the high bay exhaust fans which required them to work on the roof 90 feet above the plant for 2 to 3 days. Some of the other mechanics were assigned briefly for a half day to work with them. Parker testified that all of this work or any part thereof could have been performed by other employees. Parker and

Battistini further testified they were assigned by Supervisor Wilson in September to work on the Gantry crane which required them to work outside all day in 90 to 95 degree heat for 5 or 6 days. Parker testified that the crane had been idle since 1989. Parker testified he was assigned to work on the crane by Sapp. Battistini testified he was assigned to work on the crane by Wilson. He further testified that all the work could have been assigned to other employees. Although other employees were assigned to work on the crane, they were only required to do so for brief periods of time. Employees Terry Luckie and Russell Heinz worked for a brief period of time doing fabrication and welding work for the crane. In addition to the above, Battistini testified he was assigned to outside work of cleaning out the rain gutters in the parking lot. He had never been assigned this task before which undoubtedly could have been performed by a lower-paid general laborer employee. There was no evidence that Respondent was short of higher-skilled maintenance mechanic work to be performed. Former employee Bert Greer testified that management looked for work outside to assign to employees. I credit the above testimony by Bryant, Baker, Parker, Battistini, and Greer which is unrebutted as Wilson, Jordan, Hoeffling, Scott, and Sullenberger were not called to testify and Marlow and Davis were not questioned concerning these matters. Respondent presented Supervisor Allen Sapp to testify concerning some of these matters. Sapp testified that only two of its seven to eight exhaust fans were running and that those fans were necessary to take exhaust fumes out of the plant as a result of heavy production going on at the time. He acknowledged that some of these fans had been broken for at least a year and that Battistini and Parker were not the only employees qualified to work on them.

I find that the Respondent violated Section 8(a)(1) and (3) of the Act by the assignment of more onerous duties to prounion employees as set out above in order to isolate them in order to impede their engagement in activities in support of the Union and in retaliation for their engagement in union activities. The above evidence overwhelming demonstrates that Respondent set out to and did assign union supporters more onerous duties in violation of Section 8(a)(1) and (3) of the Act. Lakepark Industries, 293 NLRB 452 (1989); Budget Rent A Car of Washington, 276 NLRB 315 (1988), enfd. 124 LRRM 2951 (1986).

## J. The August 2 Meeting

Chris Parker testified that on August 2, President Robert Miller met with all the day-shift employees and discussed various negative aspects of unions and specifically mentioned the Eastern Airlines union dispute and outcome. Parker testified that at one point during the meeting Miller said that "no son of a bitch would bring a union to Wellstream" and "as long as he was at Wellstream, he would personally see to it that Wellstream was never unionized." Parker further testified that Miller stated he would be getting rid of all the negative people who only wanted something for nothing. Battistini corroborated Parker's testimony in this regard. He recalled that Miller stated that "Union members had a something for nothing attitude," and that "he'd personally see to it that no goddamn union would get in that company," and 'no son of a bitch would bring the Union." Battistini also recalled that Miller stated he would weed out the people with the something-for-nothing attitude. Respondent called employee Christopher Short who testified regarding a meeting which he attended at which Miller spoke. The testimony of Short was not definitive as to whether this was the same meeting, although Short did testify he sat next to Parker at the meeting. Short acknowledged that Miller had talked about the Union at the meeting but did not recall Miller having stated that no "goddamn union would ever get into Wellstream." Short acknowledged that Miller had made other comments but testified he could not remember "too many specific comments." Miller was not called to testify and Battistini's and Parker's testimony is thus largely unrebutted except with the lack of recall by the testimony of Short. As the General Counsel contends in his brief, Short's testimony was vague and uncertain. I credit Parker's and Battistini's testimony as set out above which I find to be mutually corroborative and specific and detailed.

I accordingly find that Miller's statements to the employees that no "son of a bitch" would bring a union into Wellstream, and that he would see to it that Wellstream was never unionized were clearly intended to and had the effect of conveying to the employees the futility of their support of the Union in violation of Section 8(a)(1) of the Act, *Ideal Elevator Corp.*, 295 NLRB 347 (1989). Miller's statement that he would be getting rid of the something-for-nothing people was a clear reference to the union supporters and a clear threat of discharge of those employees who supported the Union and was also violative of Section 8(a)(1) of the Act. *Bridgeway Oldsmobile*, 281 NLRB 1246 (1986), modified on other grounds 290 NLRB 824 (1988); *Farr Co.*, 304 NLRB 203 (1991).

## K. The Threat of a Lawsuit

Parker testified that in the first week of August, General Superintendent Jeff Jordan approached and said that things had become personal and that his attorneys were looking into possible slander charges against Parker. Parker asked, "why me?" and stated he could not recall anything that Jordan had read that he was referring to. Jordan then called Parker a liar and stated, "all fucking union people are liars." I credit Parker's testimony which is unrebutted as Jordan was not called to testify.

I accordingly find that the threat by Jordan to file a lawsuit against Parker was coercive in violation of the Section 7 rights of Parker because of his support of the Union and that Respondent thereby violated Section 8(a)(1) of the Act. Clyde Taylor Taylor Co., 127 NLRB 103 (1960); Pabst Brewing Co., 254 NLRB 494 (1981).

## L. Threat of Loss of a Wage Increase

Employee Grant Stevenson testified that at the time of his hire he was told by General Superintendent Jeff Jordan that he would be evaluated at the end of a 90-day probation period and would receive a raise if he received an evaluation meriting one. After his probationary period, he received a favorable evaluation and was told he would receive the raise. He spoke to Jordan on one or two occasions and was told the raise would be forthcoming. On September 20 he overheard Supervisor Jack Seale telling employees Steve Roth and Curtis Spencer that there would be no raises because the Labor Board would not permit the Respondent to give raises during a union dispute. Stevenson took issue with this and

told Seale this was a lie as he had phoned the Labor Board and been told they would not do this. Seale was called by Respondent to testify and denied making this statement but rather testified that Stevenson said he had contacted the Labor Board and that he told Stevenson he did not know anything about it but wondered if pending unfair labor practice charges had any impact on his personally not having received a raise.

I find that Respondent violated Section 8(a)(1) of the Act by the statement made by its supervisor, Seale, that there would be no raises as the Labor Board would not permit the Respondent to give raises during a union dispute. Initially I credit Stevenson's version of this conversation. I found Stevenson's testimony to be clear, explicit, and credible. I do not credit Seale's version of this conversation, I also found Seale's testimony to be evasive when he was initially asked whether he had written a letter in opposition to the Union and only admitted to doing so when confronted with the letter. When an employer attributes to the Union its failure to grant a pay raise, it violates Section 8(a)(1) of the Act. Centre Engineering, 253 NLRB 419, 421 (1980). In the instant case, the Respondent through its supervisor, Seale, was indicating to the employees that the Board would not allow raises during union disputes. This had the obvious effect of coercing employees to refrain from supporting the Union as this places their raises in jeopardy. Such a statement interferes with their Section 7 rights to support a union uninhibited from interference.

#### M. The Election Day Breakroom Incident

Battistini and Parker testified that on August 30, the day of the election at about 9 a.m. after the election was over, they entered the breakroom and heard Fitting Supervisor Jack Seale talking to about 15 first-shift employees. Battistini testified that Seale stated that "Now the election's over, the company can get back to making good pipe and competing in the marketplace and they could get rid of the bad element in the company." Battistini testified he then walked out of the breakroom. Parker testified that Seale said, "Now with all of this behind us, we will weed out a few folks and we will continue to make good pipe." The Respondent called Seale to testify who denied having made the comments attributed to him by Battistini and Parker.

I credit the clear and mutually corroborative testimony of Battistini and Parker concerning these comments made by Seale which were clearly threats of discharge of the employees who supported the Union and find that Respondent thereby violated Section 8(a)(1) of the Act. See *Bridgeway Oldsmobile*, supra; *Farr Co.*, supra.

## N. The Written Warnings and Discharge of Daniel Battistini

Daniel Battistini was an active supporter of the Union and one of three members of the in plant organizing committee designated as such by the Union in a letter to Respondent. He solicited union cards, wore union T-shirts and buttons, and distributed handbills on behalf of the Union. Battistini was employed as an electrical mechanic at the time of the issuance of written warnings to him and of his termination. As set out above in this decision, Battistini was a known active union supporter who had been identified as such by

management and had been discriminated against by a denial of his normal shift rotation with the consequent loss of the increment in pay attendant with certain shifts and had been assigned more onerous job duties as punishment for his support of the Union and in order to keep him isolated from other employees as part of Respondent's plan to keep union supporters from talking to other employees in order to stem the union campaign. The record also shows that union supporters such as Battistini and Chris Parker were targeted as union supporters and that Respondent's president and chief executive officer, Robert Miller, threatened employees with the futility of their selection of the Union as their collectivebargaining representative, and threatened to get rid of the union supporters (those who wanted something for nothing). In addition Respondent engaged in numerous other violations of the Act. Against this background of union animus, Battistini, who had no prior record of discipline, received two writeups and a suspension and was terminated on November 6, 1991.

On October 17, Battistini was observed by then Manager of Engineering Ray Marlow using channel locks (arc pliers) to loosen a hydraulic fitting on a jack used to level a platform. Battistini testified that Marlow followed him around a great deal of that day although Marlow did not directly supervise Battistini. Marlow testified that shortly after he came to Respondent in February, he informed all employees they were not to use channel locks on these type of fittings but rather were to use a strap wrench which is fashioned from a fabric like material so as not to damage the fittings which are made of a soft material. There were no written notices or postings provided by Respondent, and Battistini testified without rebuttal that he had never been told not to use channel locks on these fittings. Moreover, Battistini testified that the fitting involved in this incident was made of a hard rather than a soft material. Other employees including former Supervisor Jack Bryant and former employee Bert Greer testified that employees regularly and openly used channel locks to loosen fittings. Safety Coordinator Donald Crysell testified that the use of channel locks could strip these fittings but was not aware of the fitting in question in this instance nor had he observed any of the circumstances under which Battistini loosened the fitting. It is undisputed that no employee had ever been disciplined previously for having used channel locks to loosen these fittings. According to Marlow when he observed Battistini loosen the fitting he told him to report to his supervisor what he had done. Battistini testified that Marlow did not tell him to report to his supervisor. Later that day Marlow stood watching Battistini as he was filling an electric generator with fuel and observed Battistini block the fuel nozzle with a pipe to prevent it from automatically closing. Marlow testified that Battistini then left the immediate area. Battistini, who testified that he had never previously been closely scrutinized by Marlow who did not directly supervise him, testified he did not leave the area but rather stood back and observed the fuel nozzle as the fueling process continued because the fueling process takes up to a half hour if the fuel tank is empty and would have required him to kneel in order to hold the fuel nozzle open during the entire fueling process. He testified as did other employees that it was common to block open the nozzle because of the length of time and discomfort involved in holding the nozzle during the entire fueling process. Battistini testified that Marlow stood watching him as the nozzle was blocked during the refueling process for some time until it was finished and then approached him and told him to go to see his supervisor, Allen Sapp, and that he would be along presently. Marlow denied that he had stood for any length of time observing the fueling process but testified that he immediately called Battistini's attention to the infraction and that he would be along presently to talk to Battistini's supervisor concerning it, and that he passed the information on to Battistini's supervisor, Allen Sapp, to take appropriate action. Sapp testified this resulted in the two writeups of Battistini. Marlow and Safety Supervisor Crysell testified to the dangers to the environment and to safety that could occur if the fuel were permitted to leak onto the ground. Crysell, however, was not a witness to the occurrence or a participant in the disciplinary process. Battistini testified that the fuel hose had previously not had a nozzle with an automatic shutoff device but had been allowed to drain after usage and that he had, on his own initiative, installed such a nozzle.

With respect to the incident leading to the indefinite suspension and the discharge of Battistini, Battistini testified he had only recently after the election been rotated from the day shift where he had been relegated during the duration of the election campaign and was working the third shift. This shift runs from 11 p.m. to 7 a.m. Respondent has what is referred to as a maintenance cage where its maintenance mechanics congregate at the start of their shift and receive assignments listed by the supervisors. On October 30 one of the assignments listed for the mechanics to perform was a nonpriority item listed sixth in sequence to be performed. This assignment was to check out the A-frame of the extruder payoff line. This is a large machine operating a reel which rotates to take up or put down the piping material Respondent manufactures. This A-frame, according to the unrebutted testimony of employees Battistini, Parker, Clenney, and Greer, had for some time prior thereto not been operating in its automatic mode but had only been operated manually which requires two operators to manually control the speed and the machine. It was being used manually on the third shift to which Battistini was assigned on October 30. Battistini was thus unable to work on the machine until an hour or so prior to the end of his shift. Prior to working on the machine Battistini had installed his lockout on the power source in order to ensure the power was not on while he worked on the machine. He changed the fuses and removed the lockout and ran the machine, but it began to pick up speed and run "wide open." The term running "wide open" means that the machine is running faster than the speed at which the machine is set. Because of its size (the wheel is 100 feet in diameter) it takes a period of time before it is actually running at a fast pace even when running wide open according to the unrebutted testimony of Battistini and Gerald Riley. Battistini testified that he then concluded that the problem was electronic which means it was in the inner workings of the module instead of electrical involving only the wires and fuses and that he was not qualified to fix it. He then removed his lockout which would permit the machine to run in the manual mode as it had been previously doing. He returned to the maintenance cage and was unable to find his supervisor, Sapp, and went home. He did not make any notations on the assignment sheet or write a note of any kind to Sapp. He explained that it was routine not to make any notations on the log until the job was completed. This testimony was corroborated by Gerald Riley. When Sapp assigned work at the start of the shift shortly after 7 a.m., he told Gerald and Frank Riley to check out the A-frame on the payoff of the extruder line. According to Sapp at about 9 a.m. he was told by Herman Riley that this machine was running wide open and that Riley was upset by this. At the hearing Gerald Riley testified he and his brother had been assigned by Sapp to check the A-frame at 7 a.m. at the start of the shift and encountered two crossed wires on the A-frame which they fixed and that when it was run in the automatic mode, it ran wide open requiring either he or his brother to apply the stop button. There is some confusion in the testimony of Gerald Riley as to whether the normal stop or emergency stop button was applied. However, the machine was stopped without damage or injury. Also at the hearing, Riley did not express the concern that Sapp attributed to his brother and testified that there was no danger as when the machine was running "wide open" it was running very slowly because of the length of time it takes to gather speed as a consequence of its large diameter and that he or his brother were able to readily stop the machine. Gerald Riley did testify that one of his concerns in reporting to Sapp was that he and his brother not be blamed for a condition of disrepair that had been in existence prior to the time they were assigned to check the machine as he (Gerald Riley) had been previously suspended for an alleged safety infraction which suspension he did not believe was justified.

Battistini was called at home that afternoon and asked to report to personnel that evening but due to a prior appointment was unable to do so and he was told not to report on his normal shift but to report to the personnel office on the following day at 9 a.m. which he did. At the meeting, the wiring and the procedure he had used were discussed and Battistini was asked why he had not locked out the machine. Battistini told them he had not locked out the machine, because it was running in that state (manual mode only) before he worked on it and it was considered an operational machine. He was issued a writeup of a violation notice by his supervisor, Allen Sapp. A meeting with Human Resources Manager Davis and his assistant, Kip Allsteater, was the following day after he received the writeup from Sapp. At that meeting Sapp said it was just a hunch that he had Riley check out the machine the morning after Battistini had worked on it and that Riley had to hit the emergency button to stop it. Battistini denied that he told Davis at this meeting that he went home without notifying Sapp of the condition of the A-frame because he was tired. Battistini further testified that after the completion of the shift when he worked on the A-frame, there was another shift of maintenance employees coming on and this job was still on the "pass down log" to be worked on. At this meeting Battistini was suspended pending a meeting that Davis told him he was going to have with Marlow, George Scott, Allsteatter, Sapp, and himself to come to a conclusion of this matter after their in-

Battistini was called back November 6 and terminated at a meeting attended by Davis. He carried a recording device and secretly taped the meeting which tape was received in evidence. Present at this meeting were Davis, Sapp, and Allsteatter. Davis told him he was being terminated because of the seriousness of the lockout violation and his failure to write down the problem on the report and because of two safety violations within a short period of time.

### Analysis

I find that the General Counsel has established a prima facie case of a violation of Section 8(a)(3) and (1) of the Act in each instance, that is in the instance of the two writeups and the suspension and discharge. Initially I find that the antiunion animus of the Respondent toward the Union and its supporters and specifically toward Battistini who was one of the three members of the Union's in house organizing committee has been overwhelmingly established, as demonstrated by the unlawful threats issued by Respondent's management toward union supporters and the discrimination practiced against certain of the supporters including Battistini and Chris Parker who were punished for their union activities by the denial of their normal shift rotation and by the assignment of more onerous duties to them. Moreover, I am convinced that in each instance of discipline issued against Battistini, the Respondent and its management seized on any pretext available to discipline Battistini and ultimately rid itself of one of the chief union proponents. I found Battistini to be a credible witness who testified in a low-key straight forward manner and who did not attempt to embellish his testimony in order to gain any advantage in this proceeding. I also found the other witnesses presented by the General Counsel who testified concerning the practice of using channel locks to loosen fittings, pipes to block out the fuel hose nozzle, and the practices concerning lock out procedures and the condition of the A-frame to be credible. I was particularly impressed by the testimony of former Supervisor Jack Bryant who testified with excellent recall concerning the Respondent's efforts to stem the union campaign and its assignment of onerous job duties to union supporters. I was not convinced by the denials of Marlow concerning the discriminatory treatment of Battistini and his having only coincidentally observed Battistini twice on the same day in alleged infractions of Respondent's rules. Moreover, I note that there was no published rule concerning the use of strap wrenches on the fittings in question nor was there any evidence that Battistini was apprised of any rules prohibiting the blocking out of the fuel nozzle. Although Crysell's testimony concerning the safety aspects supporting the use of a strap wrench, the reasons for not blocking out the fuel hose nozzle, and the lockout procedure were informative, they did not show that Battistini had been apprised of either the need to use a strap wrench as contended by Marlow or the prohibition of blocking out the fuel hose nozzle. Moreover, the information concerning the lockout procedure was not dispositive of the circumstances in this case assuming that Battistini was apprised of the procedure in the safety meeting held by Crysell. Thus, I credit Battistini's testimony and find that he had not been advised of any prohibition of using channel locks to loosen fittings or of any prohibition of blocking out the fuel hose nozzle. I also conclude that the employees corroborating his testimony should be credited. I also conclude that it was of questionable necessity for the A-frame to have been locked out by Battistini after he worked on it in view of its use in the manual mode shortly prior thereto on the same shift and for some substantial periods before while its automatic mode was not operational. Thus I find that the Respondent seized on a pretext to discipline and discharge Battistini. I simply

do not find that in any of these instances, it would have disciplined and discharged Battistini in the absence of his protected concerted activities on behalf of the Union. Moreover as the ultimate discharge of Battistini was based in part on the prior unlawful writeups and suspension of Battistini, it was violative of the Act in this regard also. *Jordan Graphics*, 295 NLRB 1085 (1989).

I thus conclude that the Respondent has failed to rebut the prima facie cases of violation of Section 8(a)(3) and (1) of the Act by the Respondent's issuance of the two writeups and the suspension and by its discharge of Battistini, *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

# O. The Written Warnings and Suspensions of John (Chris) Parker

Chris Parker was initially employed by Respondent on December 4, 1989. He was a maintenance mechanic. On May 26, he wrote an anonymous letter to the employees of Respondent seeking to find out if there was an interest in establishing a union. According to the unrebutted testimony of former Supervisor Jack Bryant, the letter was discussed in supervisory meetings in May and June after the interest of employees in the Union became known, and it was stated that Parker was probably the author of the letter. Parker soon became the leading adherent of the union campaign having contacted union officials and he was designated as the chairman of the in house organizing committee in a letter sent by the Union to Respondent and he began to wear a union Tshirt and buttons, and solicit union authorization cards and handbill on behalf of the Union in front of the Respondent's facility. He was the subject of interrogation and disparaging remarks by management, particularly by then Engineering Manager Ray Marlow. He, along with Battistini and Clenney, was denied his normal shift rotation and relegated to the day shift during the union campaign in order that he might be watched with the consequent denial of the pay increment attendant with shift rotation. He along with Battistini was assigned to onerous work assignments as punishment for his support of the Union and to keep him isolated from other employees to inhibit his support of the Union.

On October 16, Parker was issued a written reprimand and suspended for his alleged insubordination for refusing to put on his safety glasses while walking in a safety aisle in the plant. The uncontroverted testimony of Parker and several employees and of former Supervisors Jack Bryant and Craig Baker was that employees were not required to wear safety glasses while in the safety aisle, a nonwork area in the plant, that visitors often did not wear them in the plant, and that there was no written rule requiring they be worn in the safety aisles. Former Supervisor Jack Bryant testified that on the day of the incident he and then Supervisor John Miller were standing in the doorway of the supervisors' office and Miller said, "Chris [Parker] is not wearing his safety glasses." At the time Parker was in the safety aisle headed toward the breakroom. Bryant told Miller that Parker was in the safety aisle and urged Miller to let him alone, Miller responded, "No, I'm going to get him" and "went after Parker."
Parker testified that Miller walked past him and pointed to his head and said it applies here too Chris. Parker testified

he was not sure what Miller was talking about and had his safety glasses on top of his head and was in the process of opening the door to the restroom and continued on. Miller subsequently contacted Parker's supervisor, Allen Sapp, who gave Parker a writeup for not putting his safety glasses on. Sapp said, "This is how it's come down and there's nothing you can do about it." It is undisputed that there was no written rule requiring employees to wear their safety glasses in the safety aisles and that they were not worn there. It is also undisputed that no employee had ever been disciplined for failure to wear his safety glasses. On the same day Parker received the writeup for failure to wear his safety glasses, a notice requiring the wearing of uniforms and safety equipment including safety glasses dated October 9 which was 7 days prior to this incident on October 16 appeared on the bulletin board. No evidence was presented regarding who promulgated or posted this notice. The following morning Sapp met Parker by the timeclock as he came in and said he had been instructed to take him to Human Resources Manager Davis' office. When they arrived Davis was not there. Shortly thereafter Davis and his assistant, Kip Allsteater, came in and asked Sapp to wait outside. Davis asked Parker his version of the safety glasses' incident which Parker gave him. Davis asked why he had not complied with Miller's instructions and Parker told him because of Miller's "asshole attitude." Parker attempted to explain how Miller had treated him with hostility during the campaign, but Davis told him this was not relevant. Davis continued to question Parker and asked him why he had left work early on the day of the writeup. Parker told him because he had a doctor's appointment. Davis asked Parker why he had not notified Sapp earlier and Parker told Davis that Sapp had no problem with it and that Davis could call the medical facility to verify the appointment. Davis then said, "Three day suspension for insubordination." He asked Davis twice why he was being suspended, and Davis initially said for insubordination and then said, "That is all I have to tell you. You figure it out." Davis also told Parker that while he was on suspension, they would be looking into other possible violations against him. Parker testified further that he had never been previously warned about wearing safety glasses in the safety aisle and he had been seen by many supervisors without them in the

Subsequent to the safety glasses' incident, Parker was finally rotated to the second shift after the election, having been relegated to the day shift the duration of the union campaign. On December 3, the second night he was on the second shift, Respondent's supervisor, Allen Sapp, who was not on duty at the time, called in and told Steve Roth, the supervisor on duty, to have an employee go to the second floor to check the temperatures of the offices as a cold wave was expected. The supervisor, Steve Roth, assigned Parker to go up to the second floor where the offices were located and the third floor where the cooling and heating units were located and check. The Respondent had instituted a policy of not permitting employees to go up to the second and third floors during the second and third shifts without an escort and of requiring them to sign a log that they had gone inside these areas at all times. Initially, this policy was initiated in the summer of 1991, ostensibly because of concern that certain of Respondent's plans, trade secrets, or bids would be disclosed in whole or in part to Respondent's sole competitor,

a French company which dominates the field in Respondent's business of manufacturing undersea piping for the transportation of oil. Subsequently in October 1991, the Respondent had a massive reduction in force which affected the entire operation including reductions from top management personnel on down the line. Respondent had previously employed uniformed security guards who checked employees at the gate to the entry of the plant. However after this layoff Respondent also employed more specialized and highly trained plainclothes guards known as the "Hillman guards." Several employees testified that even after the promulgation of this alleged rule they continued to go to the second and third floor unescorted as the supervisors would tell them to go ahead as they were too busy to escort them. Parker testified that on this occasion after Supervisor Roth told him to go to these areas he checked with the regular uniform guard who told him to go ahead on his own. As he was unable to get to the second and third floors by the stairs as the doors to these floors were locked, he took the elevator and proceeded to check the open offices for temperatures and did not need to make any adjustments on the units. As he was proceeding down the hallway he was met by two of the Hillman guards who asked him to identify himself and to show them his badge. He told them his name and went with the guards to his locker where his badge was at the time. On showing the guards his badge, one of them said, "You are who you say you are." They then permitted him to go back to work which he did. On the next day Marlow was informed of this incident and called Parker to his office for questioning. Marlow testified that he was puzzled about this incident as the guards informed him that Chris Parker had initially identified himself as Scott Parker (his brother who also works at the plant) and was wearing a camouflage outfit such as that normally worn by Scott Parker. Chris Parker testified that Marlow questioned him as to what he was doing on the second and third floor without an escort. Parker explained the foregoing to Marlow, but Marlow persisted in questioning him over and over about the incident and after a great deal of time (20 minutes or so) Parker finally told Marlow he was being railroaded and walked out of the meeting. Marlow suspended him for 5 days for insubordination although he testified he would have suspended him in any event for failing to obtain one of the Hillman guards as an escort.

### Analysis

I find the General Counsel has established prima facie cases of violations of Section 8(a)(3) and (1) of the Act by Respondent's writeup of Chris Parker for the alleged safety glasses' violation and the 3-day suspension for insubordination and the 5-day suspension of Parker for insubordination concerning the alleged security violation. Respondent's knowledge of Parker's union activities and its animus toward the Union and its supporters and Battistini and Parker in particular has been established as evidenced by the disparaging remarks directed toward them and the unlawful discrimination against then by denying them their normal rotation with the consequent loss of an increment in pay and by assigning them more onerous work. Parker, as the recognized in plant union organizing leader, was particularly singled out for harassment by Marlow who regularly harassed him about the

Union and offered to tell him horror stories and imposed his views on Parker notwithstanding Parker's protestations.

With respect to the incident involving Supervisor Miller and the safety glasses, I credit Parker's and Bryant's unrebutted testimony. It is abundantly clear that this was an obvious attempt to capitalize on any perceived infraction, even a nonexistent one in Respondent's efforts to "get" Parker in retaliation for his leadership role in support of the union campaign. I also credit Parker's version over that of Marlow's concerning the persistence of Marlow in repeatedly questioning Parker concerning his being on the second floor without an escort. It is apparent that Marlow was harassing Parker by subjecting him to repeated questioning after Parker had answered his questions. It is also clear that Parker went up to the second floor on the orders of the supervisor for a work-related reason and that Parker had not had any specific instructions to obtain a Hillman guard as an escort. I find that Marlow was seizing on this incident as an opportunity to build a case of progressive discipline against Parker to suspend him and ultimately rid Respondent of a known leader of the Union's organizing campaign. I thus conclude that Respondent has failed to rebut the prima facie cases of violations of Section 8(a)(3) and (1) of the Act established by the General Counsel by Respondent's writeup and 3-day suspension of Parker for insubordination for the alleged safety glasses' violation and Respondent's 5-day suspension of Parker for insubordination in connection with his presence on the second floor without an escort. Although Parker's departure from the meeting with Marlow may or may not have been the judicious thing to do, I find it was fully warranted by Marlow's harassment of Parker. Wright Line, supra; NLRB v. Transportation Management Corp., supra; Roure Bertrand Dupont, Inc., supra.

It should be noted in respect to the alleged infractions committed by Battistini and Parker on which Respondent relied as the bases for their discipline, that nothing in this decision should be construed as an infringement on the Respondent's right to run a safe and efficient business operation. However, I have simply found that these two employees were disciplined because of their support of the Union and not because of the alleged infractions attributed to them.

## P. Solicitation of Grievances

At the hearing the General Counsel offered a tape and transcript of a conversation between Plant Manager Ray Marlow and employee Chris Parker which was secretly taped by Parker on December 12, 1991 (G.C. Exhs. 31 and 32). The General Counsel also offered a tape and transcript of a conversation between Personnel Manager Larry Davis and employee Daniel Battistini which was secretly taped by Battistini on November 11, 1991 (G.C. Exhs. 44 and 45). As the credited testimony of Parker and Battistini and the contents of the taped conversations show, Marlow and Davis were engaged in conduct violative of the Act directed against union supporters Parker and Battistini. Marlow when questioned concerning the tape of his conversation with Parker testified that the tape reflected the actual conversation. Davis was not questioned concerning the tapes and Battistini's testimony that they were accurate recordings of that meeting is thus unrebutted.

At the hearing the Respondent objected to the tapes and transcripts on the ground that they were not the best evidence. I received the tapes and transcripts in evidence. Subsequent to the hearing, Respondent filed a posthearing motion to exclude the tapes and transcripts on the ground that they were surreptitiously taken in violation of Florida State Law, citing FS 934 (1991); and Board cases Maywood Do-Nut Co., 248 NLRB 529 (1980); and Carpenter Sprinkler Corp., 238 NLRB 974 (1978). The General Counsel and the Charging Party both filed opposition to Respondent's motion. The General Counsel argues in her opposition that the Maywood Do-Nut and Carpenter Sprinkler cases are not dispositive of this case as those cases both involved tape recordings of contract negotiations and the Board in those cases excluded surreptitiously recorded conversations on grounds that to permit their introduction in evidence would "inhibit severely the willingness of parties to express themselves freely and would seriously impair the functioning of the collective bargaining process." However, in the instant case the parties offering the tapes (Parker and Battistini) were parties to the conversation both involving the alleged commission of unfair labor practices against them and have testified without rebuttal to their accuracy. Accordingly, these recordings were both relevant and probative of the events. East Belden Corp., 239 NLRB 776 (1978). Moreover as the Board held in Plasterers Local 90 (Southern Illinois Builders), 236 NLRB 329 (1978), even in cases where the tapes have been recorded in violation of state law, this does not dispose of questions of their admissibility in proceedings before Federal agencies. Rather in the Southern Illinois case the Board relied on the Wire Interception and Interception of Oral Communications Federal statute at 18 U.S.C. § 2510 et seq. (1968), which has been found by two Federal circuit courts to exempt situations where an individual records a conversation in which they are a party. In that case the Board cited the two circuit court decisions in which tape recordings were admitted into evidence even though they had been obtained in violation of state law. I thus find that the Florida statute in question is not dispositive of the issue of admissibility in this case. I also find the tapes to have been accurate and authentic as to the conversations involved and find them to be relevant and probative of the issues in this case. I accordingly once again deny Respondent's motion to exclude them from evidence in this case, Fontaine Truck Equipment Co., 193 NLRB 190 (1971).

Pertinent parts of that tape and transcript are as follows as Marlow speaks:

I just want to know what personally I have done to you . . . to cause you so much problems, me personally. Have I not listened to anything you have said? Have you come to me with anything . . . .

What started all the bad relations [unintelligible]? Was it when I came or before I came or what the hell was it?" . . . (Pause) Bad history? Like I was saying, when did the problem start? What is there that the company can do to try and correct any rights that have been [done]? Are you telling me that you are not going to give me any information which will help me to run this plant better?

I'm asking you for suggestions;

Parker states, "I have no suggestions. I have no suggestions; Marlow responds: You have no suggestions for change? That's an interesting point you want change, but you have no suggestions for change. Parker

replies that he just wants to do his job. Marlow then discusses with Parker that he is trying to establish better working relationships between management and the employees and states "I am attempting to establish better relations and you're not being cooperative at all and you have said you will not be cooperative in fact. Later, Marlow states, I'm simply asking you exactly what in the hell can we do to get over this adversarial relationship? What? What? What? [G.C. Exhs. 31, 32.]

The above statements were not denied by Marlow who stated at the hearing that they were generally correct. I find that Respondent thus violated Section 8(a)(1) of the Act by soliciting grievances from Parker and by implicitly threatening him with discipline for refusing to cooperate by bringing grievances to Marlow's attention. Although the election had taken place, its validity was being contested by the filing of objections which were currently pending and there was in place an organizing campaign. There was no evidence that there had been any past practice of airing of employee grievances. Rather Marlow's meeting with Parker was clearly an attempt to pin down the leader of the Union's organizing committee as to what grievances existed with the implicit promise that they would be remedied. First Data Resources, 241 NLRB 713 (1979); Raley's Inc., 236 NLRB 971, 972 (1978).

### Q. Conduct Affecting the Results of the Election

As I have found that Respondent violated Section 8(a)(1) of the Act during the critical period by unlawfully interrogating its employees regarding their union membership, activities, and sympathies, by threatening them with plant closure if they selected the Petitioner Union as their bargaining representative, by restricting the access of prounion employees because of their support of the Union, by informing them that they would no longer be rotated from shift to shift because of their support of the Union, by instituting and enforcing a uniform rule in order to hide their union T-shirts, by threatening employee Chris Parker with a lawsuit because of his activities on behalf of the Union, by threatening employees with discharge because of their support of the Union, and by telling its employees it would never permit them to select a union as their bargaining representative, thus informing them of the futility of doing so, Objection 1,A which is based on the above is sustained. As I have found that Respondent violated Section 8(a)(1) of the Act by engaging in an unlawful preelection betting pool, Objection 1,C is sustained. As no evidence was presented to support Objection 1,F alleging unlawful interrogation of employees by the Employer a few days prior to the election as to how they were going to vote, Objection 1,F is overruled. I further find that Objection 2,C should be sustained as Respondent's president and chief executive officer, Robert Miller, distributed a letter to all employees which threatened plant closure and, in the event of a strike, threatened employees with loss of employment by "Permanent Replacements." It is the Board's stated policy to "direct a new election whenever an unfair labor practice occurs during the critical period since conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." Super Thrift Markets, 233 NLRB 409 (1977), citing Dal-Tex Optical Co., 137 NLRB 1782, 1786-1787 (1982). I accordingly recommend that Objections 1,A, 1,C, and 2,C be sustained, that Objection 1,F be overruled, that the election be set aside, and that a rerun election be conducted.

#### CONCLUSIONS OF LAW

- 1. The Respondent, Wellstream Corporation, is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Charging Party, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229, is and has been at all times material a labor organization within the meaning of Section 2(5) of the Act.
- 3. By its interrogation of its employee, Scott Parker, by its general superintendent, Jeff Jordan, on or about June 14, 1991, concerning the union activities of its employees, Respondent violated Section 8(a)(1) of the Act.
- 4. By its interrogation of its employee, Chris Parker, by Security Manager Harvey Driscoll on or about June 28, 1991, as to whether he had heard who was behind the union talk among the employees in the plant, Respondent violated Section 8(a)(1) of the Act.
- 5. By its interrogation of its employee, Chris Parker, by Engineering Manager Ray Marlow on or about July 9, 1991, whether he would be attending an upcoming representation hearing scheduled for July 11, 1991, Respondent violated Section 8(a)(1) of the Act.
- 6. By its distribution and maintenance of an overly broad rule prohibiting solicitation, Respondent violated Section 8(a)(1) of the Act.
- 7. By its implementation and enforcement of a new uniform policy in order to curtail the wearing of union T-shirts, Respondent violated Section 8(a)(1) of the Act.
- 8. By the threat of unspecified discipline issued by Supervisor Allen Sapp to employee Chris Parker if he failed to comply with Respondent's disparately enforced uniform policy, Respondent violated Section 8(a)(1) of the Act.
- 9. By the statements made by Robert Miller, its president and chief executive officer, to employees in a meeting held on August 2, 1991, that Respondent would not allow a union at its facility, thus demonstrating the futility of the employees' selection of the Union as their elected collective-bargaining representative and by the threat of discharge of union supporters issued to employees by Miller at that meeting, Respondent violated Section 8(a)(1) of the Act.
- 10. By its threat to discharge prounion employees issued by its supervisor, Jack Seale, issued to employees in the breakroom shortly after the election on August 30, 1991, Respondent violated Section 8(a)(1) of the Act.
- 11. By the threat of a lawsuit issued by its general superintendent, Jeff Jordan, during the first week of August 1991 to employee Chris Parker because of his union activities, Respondent violated Section 8(a)(1) of the Act.
- 12. By its threat of the loss of a wage increase issued by its supervisor, Jack Seale, to its employees Steve Roth and Curtis Spencer on September 20, 1991, Respondent violated Section 8(a)(1) of the Act.
- 13. By the solicitation of grievances by Plant Manager Ray Marlow of employee Chris Parker on December 12, 1991, Respondent violated Section 8(a)(1) of the Act.

- 14. By its institution and conduct of a betting pool on the results of the upcoming representation election, Respondent violated Section 8(a)(1) of the Act.
- 15. By its restriction of access to the second and third floor of its prounion employees, Respondent violated Section 8(a)(1) of the Act.
- 16. By its statements to employees John Chris Parker and Jon Eric Clenney that they would not be rotated because of their support of the Union, Respondent violated Section 8(a)(1) of the Act.
- 17. By its imposition of more onerous working conditions on its prounion employees, Respondent violated Section 8(a)(1) and (3) of the Act.
- 18. By its failure to rotate prounion employees John Chris Parker, Daniel Battistini, and Jon Eric Clenney, Respondent violated Section 8(a)(1) and (3) of the Act.
- 19. By its issuance of written warnings to Daniel Battistini on October 17 and 31, 1991, and its suspension of Battistini on October 31, 1991, and its discharge of him on November 6, 1991, Respondent violated Section 8(a)(1) and (3) of the Act.
- 20. By its issuance of a written warning on October 16, 1991, and 3-day suspension to Chris Parker on October 17, 1991, and by its 5-day suspension of Parker on December 5, 1991, Respondent violated Section 8(a)(1) and (3) of the Act.
- 21. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

### THE REMEDY

As I have found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice. Respondent shall rescind its unlawful written warnings issued to its employees Daniel Battistini and John Chris Parker, its unlawful suspensions of Chris Parker and Daniel Battistini, and its unlawful discharge of Daniel Battistini. Battistini shall be offered full reinstatement to his former position or to a substantially equivalent position if his former position no longer exists. Employees Jon Eric Clenney, Daniel Battistini, and John Chris Parker shall be made whole for all loss of pay and benefits incurred by them as a result of Respondent's unlawful failure and refusal to rotate them in accordance with its established practice. John Chris Parker shall be made whole for all loss of pay and benefits, including seniority and other rights and privileges sustained by him as a result of Respondent's unlawful suspensions of him. Daniel Battistini shall be made whole for all loss of pay and benefits including seniority and other rights and privileges sustained by him as a result of Respondent's unlawful suspension and discharge of him. Backpay and benefits shall be with interest as computed in the manner prescribed in F. W. Woolworth Co., 90 NLRB 289 (1950), with interest prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).4 Respondent shall also expunge its records of all references to the unlawful failure to rotate Clenney, Parker, and Battistini, the unlawful issuance of written warnings to Parker and Battistini, the unlawful suspensions of Parker and Battistini, and the unlawful discharge of Battistini and inform them in writing that this has been done and that such unlawful actions will not be used against them in any manner in the future. Respondent shall also preserve all necessary records for computing backpay and benefits and make them available to the Regional Director for Region 15 or his representatives.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### **ORDER**

The Respondent, Wellstream Corporation, Panama City, Florida, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Interrogating its employees concerning their union membership, sympathies, and activities and those of their fellow employees.
- (b) Threatening employees with discharge, plant closure, unspecified discipline, and the futility of their support for or selection of a union, with the withholding of their normal shift rotation, with a lawsuit, or with loss of a wage increase.
- (c) Instituting and disparately enforcing a uniform policy in order to restrain or inhibit its employees' union activities.
- (d) Distributing and maintaining an overly board nonsolicitation policy.
- (e) Refusing or failing to follow its normal practices of shift rotation for prounion employees.
- (f) Instituting and conducting a betting pool on the outcome of a representation election.
- (g) Soliciting grievances with the implicit promise to remedy them in order to discourage its employees from choosing union representation.
- (h) Restricting access of prounion employees to the second and third floors of its facility.
- (i) Assigning more onerous duties to its prounion employees in order to isolate them from other employees and to retaliate against them for their engagement in union activities.
- (j) Issuing written warnings, suspending, and discharging employees because of their membership in or their support of a union or their engagement in activities on behalf of a union.
- (k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Rescind its unlawful written warnings issued to Daniel Battistini and John Chris Parker, its unlawful suspensions of Battistini and Chris Parker, and its unlawful discharge of Daniel Battistini. Offer Battistini full reinstatement to his former position or, if his former position no longer exists, offer to reinstate him to a substantially equivalent position. Make Jon Eric Clenney, John Chris Parker, and Daniel Battistini whole for all loss of pay and benefits and other rights and privileges including seniority sustained by them as

<sup>&</sup>lt;sup>4</sup>Under *New Horizons*, interest is computed at the "short term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

<sup>&</sup>lt;sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

prescribed in the remedy section of the decision as a result of Respondent's unlawful refusal and failure to rotate them from shift to shift in accordance with its normal practice, and for the suspensions of Battistini and Parker and the discharge of Battistini.

- (b) Remove from its records all references to its unlawful refusal to rotate Clenney, Parker, and Battistini, its issuances of a warning and suspensions to Parker, and its issuance of warnings and its suspension and discharge of Battistini and inform them in writing that this has been done and that such unlawful acts will not be used against them in any manner in the future.
- (c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
- (d) Post at its facility, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by

the Regional Director for Region 15, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the election held on August 29 and 30, 1991, in Case 15–RC–7620 be set aside, and that the case be remanded to the Regional Director for Region 15 for the purpose of conducting a new election.

National Labor Relations Board' shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>&</sup>lt;sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the